BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANE M. MATTHEWS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,297
CATALYTIC INDUSTRIAL GROUP INC.	)	
Respondent	)	
AND	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 29, 2011, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was referred for a lumbar MRI scan and other tests as recommended by board certified neurological surgeon Paul S. Stein, M.D. After completion of the recommended tests, Dr. Stein was instructed to update his independent medical examination (IME) report of January 20, 2011, on the basis of the new studies.

Claimant appeared by her attorney, Angela D. Trimble of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard/Ryan D. Weltz of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held January 20, 2010, with exhibits; the transcript of Preliminary Hearing held December 8, 2010, with exhibits; the transcript of Preliminary Hearing held April 27, 2011, with exhibits; and the documents filed of record in this matter.

ISSUES

1. Respondent contends that the test recommendations made by Dr. Stein are not reasonably necessary to cure claimant from the effects of her workplace injury. Respondent further contends that the January 20, 2011, report of Dr. Stein supports its position that claimant's ongoing need for medical treatment is not related to her

accident with respondent. Claimant contends that the recommended tests are to a different part of claimant's body and will more fully identify claimant's physical problems and the source of those problems.

2. Does the Board have jurisdiction to determine this matter at this time?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and this appeal should be dismissed.

Claimant worked for respondent in the pad room, cutting and weighing pads and then running the pads through the oven and spraying them. At one point, on September 5, 2008, claimant left her work station to go to the bathroom. On her return trip, while coming down the stairs, claimant missed a step, landing hard on the cement floor with her right foot. This caused pain in her right leg. Claimant advised Norman, her lead person, of the accident. She sought chiropractic treatment on her own and later came under the care of Joseph R. Spurlock, M.D. X-rays of the lumbar spine indicated disc space narrowing at L4-5 and L5-S1 consistent with degenerative disk disease.

Later, physical medicine and rehabilitation specialist Bradley Davis, M.D., diagnosed claimant with right greater trochanter bursitis, possible piriformis syndrome and low lumbar degenerative disk disease. Claimant was examined and treated by a multitude of health care professionals. The matter went to preliminary hearing on January 20, 2010, after respondent denied the claim. As the result of the preliminary hearing, claimant was awarded the medical treatment of Dr. Davis and Dr. Spurlock to be paid as authorized medical treatment. The ALJ determined that claimant had suffered an injury which arose out of and in the course of her employment with respondent. That Order was not appealed to the Board.

The matter again went to preliminary hearing on December 8, 2010. A dispute had arisen regarding claimant's need for additional steroid injections beyond those already administered. The ALJ ruled that claimant should be referred to Dr. Stein with the instruction that if Dr. Stein decided that claimant needed additional treatment or ongoing pain management, he would be authorized to treat or refer.

Dr. Stein examined claimant on January 20, 2011. He diagnosed claimant with right inferior buttock and lateral hip pain and pain into the right ankle. He reviewed numerous medical records including the x-rays of claimant's lumbar spine indicating disc space narrowing at L4-5 and L5-S1 consistent with degenerative disk disease. An MRI of claimant's pelvis and sacrum was read as basically normal. Dr. Stein determined that

claimant's pain complaints appeared to be considerably greater than might be expected given the mechanism of the injury and the studies performed on claimant. Dr. Stein determined that **it was not possible to document a causal relationship between claimant's current symptomatology and the reported work incident within a reasonable degree of medical probability.** He made note of the absence of an MRI of the lumbar spine and recommended that one be performed.

An MRI scan of the lumbar spine had been performed on April 9, 2010, of which Dr. Stein was unaware. Both the report and the disk containing the images of the lumbar MRI scan were provided to Dr. Stein. Dr. Stein then issued a followup report dated March 2, 2011. In that report, Dr. Stein discussed a disk protrusion at L4-5, more on the right, with a relatively small protrusion on the transverse views. He could not rule out some irritation of the right L5 nerve root. Dr. Stein then recommended a new lumbar MRI scan with special attention to L4-5 on the right, with multidimensional reconstructions. Dr. Stein noted that a lumbar myelography may be recommended later along with an MRI scan of the sciatic nerve through the buttock.

The matter again came to preliminary hearing with claimant requesting the additional medical tests recommended by Dr. Stein. The ALJ issued the Order of April 29, 2011, which instructed Dr. Stein to update his IME after the recommended followup tests were completed. Respondent appealed, contending that the treatment recommendations of Dr. Stein were not reasonably necessary to cure claimant from the effects of her work injury. The April 29, 2011, Order did not address causation.

Claimant had been earlier referred to board certified orthopedic surgeon Edward J. Prostic, M.D., on September 17, 2010. Dr. Prostic found claimant to have suffered an injury to her low back as the result of the accident at work. He diagnosed claimant with radiculopathy and trochanteric bursitis.

The ALJ's Order of April 29, 2011, appears to ask Dr. Stein to evaluate the new tests and then determine whether his earlier opinion on causation remained. With the introduction of the new medical tests, it is possible that Dr. Stein may modify the causation opinion earlier expressed.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

The ALJ, in the Order of January 27, 2010, found that claimant had satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. That finding was not appealed to the Board. The January 20, 2011, report of Dr. Stein questions the cause of claimant's complaints, but it also requests additional tests, inferring that some doubt may have remained in his mind. Dr. Stein's supplemental report of March 2, 2011, indicates possible lumbar involvement not earlier determined. The review of the added MRI scan supports claimant's position that she did, in fact, suffer an injury to her low back, with the tests indicating a possible cause for her symptoms.

The April 29, 2011, Order of the ALJ instructs Dr. Stein to update the IME on the basis of the new diagnostic studies. Perhaps the opinion of Dr. Stein from the January 20, 2011, report had raised a question in the ALJ's mind regarding the cause of claimant's need for ongoing medical treatment. The April 29, 2011, Order instructs Dr. Stein to update the IME of January 20, 2011. While the Order allows the tests and "other treatment" as recommended by Dr. Stein, the report of March 2, 2011, does not

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

recommend treatment, merely added tests. It appears the ALJ desires a new opinion from Dr. Stein regarding the cause of claimant's ongoing problems and need for future treatment. Rather than a finding of compensability, the April 29, 2011, Order of the ALJ is an interlocutory order. Once the report of Dr. Stein is received, the ALJ will, once again, be in a position to determine the cause of claimant's problems and need for ongoing medical treatment.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[5]

This Board Member finds that there is no jurisdiction to review this matter at this time. When the questions presented by the ALJ to Dr. Stein are answered, then the issue of causation may again be presented and determined. Until that time, this matter remains on hold pending Dr. Stein's next report. Respondent's appeal of this Order is dismissed, and the Order of April 29, 2011, remains in full force and effect.

The parties agreed in their briefs to the Board that the Board has jurisdiction to hear and decide this matter. However, the right to appeal is statutory.[6] When the record reveals lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[7] Ordinarily, parties cannot consent, waive, or confer jurisdiction on a court.[8]

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[5] K.S.A. 44-534a(a)(2).

[6] *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 541, 836 P.2d 1142 (1992).

[7] *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[8] *In re Marriage of Harris*, 20 Kan. App. 2d 50, 58, 883 P.2d 785, *rev. denied* 256 Kan. 995 (1994).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of the ALJ dated April 29, 2011, is an interlocutory order instructing Dr. Stein to review added medical tests and revisit his opinion on whether claimant's need for treatment and current complaints are the result of her original work-related accident with respondent. The Board does not have the jurisdiction to review this Order at this time.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated April 29, 2011, remains in full force and effect and the appeal of respondent from that Order is dismissed.

IT IS SO ORDERED.

Dated this ____ day of July, 2011.

HONORABLE GARY M. KORTE

c: Angela D. Trimble, Attorney for Claimant
D'Ambra M. Howard/Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[9] K.S.A. 44-534a.